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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JUAN SUROS,

Petitioner,

- v.-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Does the excessive-fines clause of the Eighth Amendment -- as made applicable to the states through the Fourteenth Amendment -- apply to restitution or reparation awards imposed in state criminal prosecutions and, if so, what factors govern its application?

2. Does a restitution award imposed in violation of state law and which directs payment of an arbitrarily-fixed sum of money for "intangible" losses and an additional sum to purchase a new security system violate due process under the Fifth and Fourteenth Amendments?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPORTED OPINION OF STATE COURTS
AND JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 14

CONCLUSION 27

APPENDIX

CERTIFICATE DENYING LEAVE
TO NEW YORK COURT OF APPEALS .. App.1

ORDER AND OPINION OF
NEW YORK APPELLATE DIVISION ... App. 3

DECISION AND ORDER OF
NEW YORK SUPREME COURT ..... App. 7

TABLE OF AUTHORITIES

Cases

Alexander v. United States, 113 S.Ct. 2766 1993)..... 14
Austin v. United States, __ U.S. __, 113 S.Ct. 2801 (1993) 14,16
Browning- Ferris v. Kelco Disposal, 492 U.S. 257 (1989) 12,14,15
Ex Parte Lange, 85 U.S. (19 Wall.) 163, 21 L.Ed. 872 (1874) 22,25
Hughey v. United States, 495 U.S. 411 (1990) 21
People v. Callahan, 80 N.Y.2d 273 (New York 1992) 13,24,25,26
People v. Fuller, 57 N.Y.2d 152, 156 (New York 1982) 25
People v. Suros, 209 A.D.2d 203, 618 N.Y.S.2d 532 (N.Y. App. Div. 1st Dept. 1994) 2
People v. Suros, 85 N.Y.2d 943 (New York 1995) 3
United States v. DiFrancesco, 449 U.S. 117 (1980) 22,25

Constitutional Provisions

U.S. Const., Amend. V 12,22
U.S. Const., Amend. VIII..... 12,14,21
U.S. Const., Amend. XIV 14,22
N.Y. Const., Art. I, §6 25

Statutes

New York Criminal Procedure Law §400.30, subds. 1 and 4 18

New York Criminal Procedure
Law §440.20 12,23

New York Criminal Procedure
Law §470.15, subd. 4(c) 23

New York Insurance Law §5102,
subsecs. (a) and (c) 17-18

New York Penal Law §60.27 17,18,24

New York Penal Law §165.00 17

Practice Commentaries

McKinney's Cons. Laws of NY,
Book 7B, Practice Commentaries
to CPLR 4545, pp. 345-346
(1992 ed.) 17

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

The petitioner, Juan Suros, respectfully prays that a writ of

certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, in and for the First Judicial Department, entered November 3, 1994.

REPORTED OPINIONS OF STATE COURTS AND JURISDICTIONAL STATEMENT

On November 3, 1994, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered an order affirming the judgment of conviction rendered against petitioner in the Supreme Court of the State of New York, New York County, on July 13, 1993 and also affirming an order of that same court denying his motion to set aside part of his sentence. People v. Suros, 209 A.D.2d 203, 618 N.Y.S.2d 532 (N.Y. App.

Div. 1st Dept. 1994). Leave to appeal to the New York Court of Appeals was denied by a judge of that Court on April 4, 1995. People v. Suros, 85 N.Y.2d 943 (New York 1995). The opinion and order of the sentencing court is not reported, but is produced in the Appendix hereto. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V:

No person shall . . . be deprived of life, liberty, or property without due process of law;

U.S. Const., Amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., Amend. XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Criminal Procedure Law §440.20, subd. 1

At anytime after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

New York Criminal Procedure Law §470.15. Determination of appeals by intermediate appellate court; scope of review.

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal proceeding which may have adversely affected the defendant.

* * *

4. The kinds of determinations of reversal or modification deemed to be upon

the law include, but are not limited to, the following:

* * *

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

New York Criminal Procedure Law §470.35. Determination by court of appeals of appeals from orders of intermediate appellate courts; scope of review.

1. Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine not only questions of law which were raised or considered upon the appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceedings resulting in the original criminal court judgment, sentence or order, regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.

New York Penal Law §60.27 [as written at time of offense herein].

1. In addition to any of the dispositions authorized by this article, the court shall consider restitution to the victim of the crime and may require restitution as part of the sentence imposed upon a person convicted of an

offense, and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his offense or reparation for the loss or damage caused thereby. The district attorney shall where appropriate, advise the court at the time of sentencing that the victim seeks restitution, the extent of injury or economic loss or damage of the victim, and the amount of restitution sought by the victim in accordance with his responsibilities under subdivision two of section 390.50 of the criminal procedure law and article twenty-three of the executive law. The court shall hear and consider the information presented by the district attorney in this regard.

2. Whenever the court requires restitution or reparation to b made, the court must make a finding as to the fruits of the offense or the loss or damage caused by the offense. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

STATEMENT OF THE CASE

Procedural History and Facts

Petitioner, Juan B. Suros, M.D., is a San Diego heart surgeon who in 1990 pleaded guilty in New York State Supreme Court, New York County, to the larceny of a number of rare coins from the premises of the American Numismatic Society ("ANS"), an organization of which he had once been a member and benefactor. After his arrest, all of the coins were returned.

Under the terms of the plea, Dr. Suros was required to pay restitution in the amount of $36,494.92, for actual out-of-pocket expenses which ANS claimed it had incurred as a result of the theft. In addition, he was directed to pay a "fine"

of one million dollars. Petitioner's counsel stipulated that "subject to the authority of the court" part of the fine (in an amount to be fixed by the court) would be paid directly to ANS; at the original sentence, this latter payment was not denoted restitution or reparation; rather, it was deemed part of the "fine" and was intended primarily for what the court termed "damage in reputation to that institution" and for installation of a security system.

The amount the court decided on was $160,000, of which $60,000 was intended for the new security system. ANS did not attempt to quantify the claimed damage to its reputation, claiming it was "incalculable." In addition to the monetary penalties, petitioner was

sentenced to a six-month jail term and five years' probation.

Dr. Suros paid all of the monies due ANS (i.e., the $160,000 portion of the fine earmarked to that institution plus the $36,494.92 in restitution), and was directed to pay to the New York City treasury the $840,000 balance of the fine in yearly installments. In late 1992, when the second installment was due, Dr. Suros moved to set aside the sentence pursuant to New York Criminal Procedure Law §440.20 upon the ground that the "fine" and "restitution" portions had been unlawfully imposed. In deciding the motion, the sentencing court agreed that the "fine" was unlawful because the Penal Law then limited fines to the greater of $5,000 or twice the "gain" from the

offense and here there was no gain inasmuch as all of the coins had been returned to the owner. On July 13, 1993, the court vacated the entire million-dollar fine, imposed the maximum permissible fine of $5,000 and reimposed the $160,000 portion of the original fine that had gone to ANS, this time determining it to be "restitution." Prior to imposition of this new sentence, the defense moved for a hearing to determine the amount of restitution pursuant to New York Penal Law §60.27, subd. 2. That application was denied. Leave to appeal to the Appellate Division of New York Supreme Court from the 440.20 order was granted and a consolidated appeal ensued from the resentence and the 440.20 order.

Both in his 440.20 motion and on

appeal, Dr. Suros argued that the purchase of a security system and compensation for claimed "intangible" damage were not proper subjects of restitution as defined by New York law; further, in the absence of sufficient record evidence of loss, it was error to award money to ANS without first conducting a hearing in accordance with state law. In the Appellate Division, petitioner also argued that the sentence violated both his Fifth Amendment due process right to be sentenced in accordance with law and his Eighth Amendment protection against excessive fines. [His "questions presented" to that Court included:

> Whether that portion of the original sentence which required appellant to pay $160,000 to the American Numismatic Society was neither a fine, restitution nor

> reparation and violated his due process right to be sentenced in accordance with law and the prohibition against excessive fines? PL §60.27; N.Y. Const., Art. I, §§5,6; U.S. Const., Amends. V, VIII & XIV (appellate division brief at p. 1).]

Here, petitioner was invoking the power of the state Appellate Division to review, de novo and as a "question of law[,]" any issue concerning whether a sentence is "unauthorized, illegally imposed or otherwise invalid as a matter of law." New York Criminal Procedure Law §470.15, subd. 4(c). Citing language from Browning-Ferris v. Kelco Disposal, 492 U.S. 257 (1989), petitioner contended that the restitution here was arbitrary and did not represent harm actually suffered by ANS.

The lower court and the Appellate

Division held that petitioner had consented to the amount of restitution ordered, thereby obviating a hearing to measure the amount of loss. The Appellate Division characterized his claim as addressing solely "the manner in which the amount of restitution was determined" and held that such error could be and had been waived, citing People v. Callahan, 80 N.Y.2d 273, 281 (1992). It held that the record disclosed a sufficient basis for the award, based on information in letters submitted by ANS, petitioner's consent and his expertise in numismatics, which "provided him with an unparalleled understanding of the 'tangible and intangible' damages which resulted from his theft of numerous coins from his victim." The Appellate Division did not

address the propriety of requiring petitioner to pay for installation of a security system, nor did it address petitioner's Eighth Amendment claim.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has addressed the reach of the Eighth Amendment's "excessive fines" clause. It has found it applicable to forfeitures, Austin v. United States, 113 S.Ct. 2801 (1993); Alexander v. United States, 113 S.Ct. 2766 (1993), but inapplicable to punitive damages in civil cases involving private parties, Browning-Ferris v. Kelco Disposal, 492 U.S. 257 (1989).

This case presents a different issue: Does the excessive-fines clause apply to restitution or reparation ordered in

criminal cases and what factors define its boundaries? It also presents the antecedent question -- expressly left open in Browning-Ferris -- of whether "the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment[.]" Browning-Ferris, supra, 492 U.S. at 276, n. 22.

This Court has recognized the Eighth Amendment as a buffer against "the potential for governmental abuse of its 'prosecutorial' power[.]" Browning-Ferris v. Kelco Disposal, supra, 492 U.S. at 266. It has also been suggested that the Amendment may find its origins in Magna Carta, which sought "to reduce arbitrary royal power" in imposing monetary penalties. Id. at 270-271.

It has been suggested that the "excessiveness" inquiry may depend on the particular nature of the monetary penalty being considered. A simple punitive fine might be subject to a proportionality inquiry: i.e., the "value of the fine in relation to the offense[,]" Austin v. United States, supra, 113 S.Ct. at 2814-2815 (Scalia, J., concurring), whereas the question in forfeiture cases might be "not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense." Id. at 2815 [emphasis in original].

A restitution or reparation order also implicates discrete issues -- and ones which are well-defined in the present case. For one thing, a court's decision

to direct a criminal defendant to pay money as compensation for harm caused can quickly devolve into a hopelessly arbitrary exercise unless some limit on the meaning of restitution is observed. Affluent defendants are particularly vulnerable because the state can force such defendants to choose between surrendering their property or their liberty.

New York law limits restitution to "economic loss or damage to the victim" (New York Penal Law §60.27, subd. 1), a term generally understood to mean "pecuniary loss" or "out-of-pocket damages[.]" See e.g., New York Penal Law §165.00; McKinney's Cons. Laws of NY, Book 7B, Practice Commentaries to CPLR 4545, pp. 345-346 (1992 ed.); New York

Insurance Law §5102, subsecs. (a) and (c). Restitution or reparation is only permitted for losses which can be quantified as an "amount", and this "amount" must be susceptible of measurement by a preponderance of the evidence. New York Penal Law §60.27, subds. 1 and 5(a); New York Criminal Procedure Law §400.30, subds. 1 and 4.

In the present case, the court ignored these statutory principles and determined that it would require restitution for the numismatic society's claimed "intangible" damage to its reputation. It then picked a round number -- $100,000 -- as the amount of the award. However, the court's action implicates more than just a violation of state law. By selecting a number that had no

evidentiary foundation, the court wielded its power to extract a monetary penalty in the arbitrary manner that the Eighth Amendment proscribes.

The arbitrary nature of this "restitution" award is best understood by recalling that at the original sentence it was not even denoted restitution but, more nebulously, "damages" and was made part of the original million-dollar fine. [The true "restitution" -- i.e., the actual out-of-pocket losses that ANS attributed to the theft -- was fixed at the lower and more refined figure of $36,494.92, which petitioner paid separately.] The parties left it to the court -- subject to its "authority" -- to determine what portion of this "fine" should be paid to the Society as "damages." In the absence of

an evidentiary yardstick, the court could have picked any number, ranging from $1 to $999,999. Accordingly, it was equally arbitrary for the court to later determine that the part of the fine destined for the city treasury was illegal, while upholding the portion of the fine doled out to ANS. In effect, the amount of the illegal fine that petitioner was relieved of paying hinged on the number the court chose to give to ANS. The approach sanctioned by the state courts here is fraught with the potential for abuse and warrants careful scrutiny.

An equally important factor applicable to the constitutional inquiry here concerns whether and to what extent a restitution award must relate to the harm actually caused by the offense. This

Court has addressed this issue in the non-constitutional arena, narrowly construing the federal Victim and Witness Protection Act to permit restitution only as to the offense of conviction. Hughey v. United States, 495 U.S. 411 (1990). The broader constitutional question here is whether the Eighth Amendment prohibits as "excessive" a restitution award which patently represents neither loss nor damage caused by the offense. For example, in the present case, Dr. Suros was required to pay $60,000 for a new security system. Yet, Dr. Suros did not steal or damage a security system -- nor was its installation a legal obligation incurred as a result of the theft. This carries the concept of restitution too far and into an area that invites governmental

abuse.

Due Process Violation

The due process clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, forbids the imposition of sentences which are unauthorized by law. Ex Parte Lange, 85 U.S. (19 Wall.) 163, 21 L.Ed. 872 (1874); United States v. DiFrancesco, 449 U.S. 117, 139 (1980). The Court is presented with an important constitutional issue, likely to reoccur unless addressed: whether a defendant's right to be sentenced in accordance with law may be waived. Such waivers should not be permitted because they invite abuses of a state's prosecutorial powers, particularly in extracting large monetary penalties from defendants who can afford to pay

them. For example, petitioner was required to pay $60,000 to fund a security system, which was clearly not restitution or reparation under New York law and only served to enrich ANS at Dr. Suros' expense.

No Procedural Bar

Further, the Appellate Division's determination that petitioner's claims were waived by his "consent," presents no bar to review here. Under New York law, a claim that a sentence is illegal is not waivable, even by negotiated plea, and is subject to collateral attack at any time or review in the first instance on appeal. New York Criminal Procedure Law §§440.20, 470.15, subd. 4(c). New York law requires a restitution hearing -- even when the award is agreed to as part of a negotiated

guilty plea -- on request of the defendant or when, as here, the record fails to disclose a sufficient evidentiary basis for an award. New York Penal Law §60.27, subd. 2. Further, petitioner, at the original sentence, only agreed to pay restitution "subject to the authority of the court" and, after the illegal fine was vacated at the resentence, he unsuccessfully moved for a restitution hearing before the court reimposed part of the fine as restitution.

The New York Court of Appeals recognizes a limited theory of waiver in restitution cases where the claimed illegality is not as to the amount or nature of the restitution but the procedures employed in fixing the award. People v. Callahan, 80 N.Y.2d 273 (New

York 1992). Here, however, the Appellate Division side-stepped the fact that petitioner was complaining not simply about procedures but about the legality of the restitution itself. These errors implicated "the very power of the court" to punish, People v. Callahan, supra, 80 N.Y.2d at 281, and violated petitioner's fundamental right to be sentenced in accordance with law. People v. Fuller, 57 N.Y.2d 152, 156 (1982); N.Y. Const., Art. I, §6; U.S. Const., Amend. V. Under state and federal due process, a defendant "may not receive a greater sentence than the legislature has authorized." United States v. DiFrancesco, supra, 449 U.S. at 139; citing Ex Parte Lange, supra, 85 U.S. (19 Wall.) 163.

Further, the Appellate Division's

attempt to pigeon-hole this case into Callahan's narrow waiver doctrine obscures the fact that its decision was truly adventurous: our research has disclosed no prior state appellate decision which authorized as "restitution" the funding of a new security system for a crime victim, where the defendant was not alleged to have stolen or damaged such system. Further, the Suros case is, to our knowledge, the only appellate authority in this state which has permitted restitution for "intangible" damages.

Clearly, then, the procedural waiver asserted by the Appellate Division is not "adequate" because it runs contrary to New York law as established by its highest court. Nor is the "waiver" claim "independent" of the federal question

inasmuch as it rests on the assumption that restitution for a security system and "intangible" losses can pass constitutional muster.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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